UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FREE SPEECH, by its Member GREG RUGGIERO; STEAL THIS RADIO; DJ THOMAS PAINE; DJ CARLOS RISING; DJ SHARIN; DJ.E.S.E.; FRANK MORALES; and JOAN MUSSEY,	
Plaintiffs,	
- against -	
JANET RENO, as Attorney General of the United States; UNITED STATES DEPARTMENT OF JUSTICE; and the FEDERAL COMMUNICATIONS COMMISSION,	98 Civ. 2680 (MBM)
Defendants.	
FEDERAL COMMUNICATIONS COMMISSION,	
	Counterclaim-Plaintiff,
- against -	
STEAL THIS RADIO; DJ THOMAS PAINE; DJ CARLOS RISING; DJ SHARIN, and DJ.E.S.E.,	
Counterclaim-Defendants.	

PLAINTIFFS' MEMORANDUM OF LAW IN REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Preliminary Statement

Plaintiffs Free Speech, Steal This Radio, DJ Thomas Paine, DJ Carlos Rising, DJ Sharin, DJ.E.S.E., Frank Morales, and Joan Mussey, respectfully submit this memorandum of law in support of their motion for a preliminary injunction.

Plaintiffs, advocates of and participants in microbroadcasting in New York City, have brought this action to vindicate their First Amendment rights to broadcast over the spectrum dedicated to radio broadcasting, subject, of course, to reasonable time, place and manner regulations. In their initial memorandum of law, plaintiffs argued that the present broadcast regulatory scheme, codified in Title III of the Communications Act of 1934 (the "Act"), 47 U.S.C. 301 et seq., as well as the Government's enforcement thereof against unlicensed microradio stations such as Steal This Radio, violates plaintiffs' First Amendment (and other) rights.

Each of the Government's proffered arguments as to why plaintiffs are not entitled to a preliminary injunction rests on the same flawed premise--that plaintiffs "assume the existence of a First Amendment right that does not exist"--which itself assumes a favorable conclusion for defendants of the exact controversy presented to this Court. Gov. Mem. at 3. The Government follows this premise with the conclusory statement that "unless plaintiffs are engaged in protected speech, questions such as whether the radio spectrum is a public forum or whether the licensing provisions improperly impose prior restraints are irrelevant," Gov. Mem. at 3, and then concludes essentially that one must have a First Amendment right to speak on the radio before one may assert a claim that one has a First Amendment right to speak on the radio. This Court should not be swayed to follow the Government's version of Marquis of Queensbery Rules. See R.A.V. v. City of St. Paul, 505 U.S. 391, 393, 112 S. Ct. 2538, 2548 (1992).

At base, the Government's theory appears to hold that the licensing scheme regulating the broadcasting of protected speech over the electromagnetic spectrum operates in some manner to divest such speech of its constitutional

character. See Gov. Mem. at 3-5. The conclusion then presumably follows that unless the FCC grants a person a license to broadcast over the radio spectrum, that person cannot assert a First Amendment right to engage in such expressive activities. Under this scenario, the Federal Communications Commission ("FCC") is apparently vested with the authority to dole out or withhold First Amendment protection at its discretion. While such a resolution would undoubtedly make plaintiffs' First Amendment challenge less troublesome for the Government, it is wholly without foundation in the decisional authority. Rather than address plaintiffs' extensive arguments on the merits, the Government has simply chosen to deny that plaintiffs even have any First Amendment rights to engage in broadcast speech, misstate plaintiffs' claims for relief, and distort the true facts surrounding FCC field agent Judah Mansbach's visit to the building out of which Steal This Radio broadcast last March. Singly and collectively, the Government's arguments provide no basis for denying the interim injunctive relief sought by plaintiffs.

ARGUMENT

I. PLAINTIFFS ARE SUFFERING IRREPARABLE HARM

A. Plaintiffs Have First Amendment Rights At Stake

The Government first argues that plaintiffs have no First Amendment rights at stake in this case, because "[i]t is well-settled that '[t]he right of free speech does not include . . . the right to use the facilities of radio without a license.'" Gov. Mem. at 4, quoting National Broadcasting Co. V. United States, 319 U.S. 190, 227, 63 S. Ct. 997, 1014 (1943) ("NBC v. United States" or "NBC"). Gov. Mem. at 4-5. That argument rests on several faulty premises.

First, the Government seemingly posits -- incorrectly -- that plaintiffs claim an unabridgeable right to broadcast that does not allow for any formof licensing. See Gov. Mem. at 4-5. To the contrary, plaintiffs have merely claimed a First Amendment right to broadcast over the spectrum dedicated to radio broadcasting subject to reasonable time, place and manner regulations. See First Am. Compl. at p. 2; Pl. Mem. at 2-3. Moreover, while plaintiffs have argued that the present broadcast licensing scheme, including the broadcast license requirement, burdens substantially more speech than necessary to serve the Government's interests in preventing signal interference and ensuring public safety, plaintiffs have also effectively acknowledged that their First Amendment rights would not be abridged by a different, less onerous licensing scheme. See Pl. Mem. at 52 (citing registration or lottery scheme comparable to those sometimes used to allocate scarce public space among different speakers in public fora). Finally, plaintiffs' challenge to the "public interest" under which the FCC has awarded licenses to broadcast radio stations, and set the terms and conditions of their operation, implicitly assumes the validity of some broadcast licensing scheme, albeit not one which confers unbridled licensing discretion on the FCC. See First Am. Compl. 90-91; Pl. Mem. at 56-65.

Second, as plaintiffs have twice previously observed, the NBC statement on which the Government so heavily relies is clearly not controlling here. See Pl. Mem. at 64-65; Pl. Opp. Mem. At 15-19. In stating that "the right of free speech does not include . . . the right to use the facilities of radio without a license," the Supreme Court was merely responding--in dictum--to the broadcast networks' assertion that the FCC could not, consistent with the First Amendment, "refuse licenses to persons who engage in specified network practices" that were prohibited by the FCC's Chain Broadcasting regulations. NBC v. United States, 319 U.S. at 226, 63 S. Ct. at 1014. The Court was not confronted with any claim that the broadcast license requirement itself contravened broadcasters' First Amendment rights and thus was never called upon to rule on that issue. See Pl. Opp. Mem. at 15-16. The NBC dictum is also not controlling here because the Supreme Court was not presented with any claims based on the public forum doctrine, such as plaintiffs pose here, and did not have before it the long record of viewpoint-based and capricious licensing decisions which now exists. See Pl. Mem. at 64-65; Pl. Opp. Mem. at 18-19.

Third, in asserting that plaintiffs have no First Amendment rights at stake in this case, the Government effectively argues that plaintiffs cannot have any First Amendment rights to engage in broadcast speech until they have been licensed by the FCC. As plaintiffs have previously observed, however, it is well settled that "the failure to apply for a license under an ordinance which on its face violates the Constitution does not preclude review ...." Staub v. City of Baxley, 355 U.S. 317, 319-20, 78 S. Ct. 277, 280 (1958). Plaintiffs thus may assert facial challenges to the current broadcast licensing scheme even if they do not hold such a license and have never applied to the FCC for one. See Pl. Mem. At 29-30. The argument that plaintiffs cannot have First Amendment rights to engage in broadcast speech until they have been licensed by the FCC is also flawed because it rests on the premise that First Amendment rights in broadcast speech only exist if the FCC says they do.

Finally, by asserting that "plaintiffs have no First Amendment right to broadcast" (Gov. Mem. at 5), the Government improperly assumes that this Court has already decided the First Amendment issues in this case and determined that plaintiffs' claims are without merit. See Miranda v. Wisconsin Power & Light Co., 91 F.3d 1011, 1016 (7th Cir. 1996) (rejecting argument which "assumes its conclusion"). If only every case could be so easily decided, congested dockets would quickly become a thing of the past.

B. Plaintiffs Have Suffered Injury

The Government next attempts to refute plaintiffs' showing of harm to their First Amendment rights from the FCC's enforcement actions against microradio stations, including, of course, Steal This Radio. Gov. Mem. at 5-6. Its arguments are again unpersuasive.

The Government first argues that plaintiffs cannot have suffered tangible irreparable harm because "Steal This Radio continues to broadcast on a regular basis." Gov. Mem. at 5. That, however, overlooks plaintiffs' averments that FCC field agent Judah Mansbach ordered members of Steal This Radio to cease and desist their broadcasting activities and threatened them with seizure of their broadcast equipment if they did not comply. See Gudes Aff. 2-8; DJ Chrome Aff. 3; First Am. Compl. 72-74. Those threats clearly establish tangible injury to plaintiffs' First Amendment rights and thus irreparable harm. See, e.g., Steffel v. Thomspon, 415 U.S. 452, 459, 94 S. Ct. 1209, 1215 (1974) (two police warnings to accused to stop handbilling or he would be prosecuted sufficient harm to confer standing). See also Pl. Opp. Mem. at 24.

Nor can the Government credibly argue that plaintiffs have not suffered tangible injury from the involuntary two-month shut down of their broadcast operations following Mansbach's first visit to Steal This Radio. Indeed, plaintiffs continue to suffer tangible injury from that shutdown, most notably, reflected in the loss of station membership, out of fear of prosecution by the FCC. DJ Thomas Paine Aff. 25. There could be no more clear chilling effect. In the First Amendment context, of course, "an actual injury can exist when the plaintiff is chilled from exercising her right to free expression or forgoes expression in order to avoid enforcement consequences." New Hampshire Right To Life Political Action Committee v. Gardner, 99 F.3d 8, 13 (1st Cir. 1996); see Meese v. Keene, 481 U.S. 465, 472-73, 107 S. Ct. 1862, 1866-67 (1987).

C. The Government Defines the Right to Listen Too Narrowly

The Government's final argument--that the listeners of Steal This Radio's broadcasts also suffer no irreparable injury--fares no better than the rest. The argument has two fatal shortcomings: 1) it misinterprets the decisional authority addressing the public's right to receive information; and 2) it rests--like the other arguments proffered by the Government--on the improper assumption that this case has already been decided in its favor.

Because the Government cannot dispute the clear decisional authority holding that the First Amendment protects the public's right to receive information as well as the speaker's freedom to express herself, see, e.g., Virginia State Bd. Of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 756, 96 S. Ct. 1817, 1823 (1976) ("[W]here a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both."); Kleindienst v. Mandel, 408 U.S. 753, 762, 92 S. Ct. 2576, 2581 (1972) (listeners' right to receive information and advise from willing speakers is "well established"); Stanley v. Georgia, 394 U.S. 557, 564, 89 S. Ct. 1243, 1247-48 (1969) ("It is now well established that the Constitution protects the right to receive information and ideas."), it is relegated to presenting an argument premised on an insinuation that listener plaintiffs' free speech rights are somehow contingent upon proof of the speaker's First Amendment rights. Gov. Mem. at 6. Because plaintiff broadcasters have "no First Amendment right to broadcast without a license"--the Government's argument continues--plaintiff listeners have no right to receive the information being broadcast by Steal This Radio. Id.

Neither of the cases cited by the Government, however, stand for the proposition that listeners' free speech rights are contingent upon, and derivative of the speaker's free speech rights. See Virginia State Bd. Of Pharmacy, 425 U.S. at 756, 96 S. Ct. at 1823; Board of Education v. Pico, 457 U.S. 853, 866, 102 S. Ct. 2799, 2808 (1982). In Pico, for example, the Supreme Court delineated the long line of precedents that have focused "not only on the role of the First Amendment in fostering individual self-expression but also [on] its role in affording the public access to discussion, debate, and the dissemination of ideas." Id. (quoting First National Bank of Boston v. Bellotti, 435 U.S. 765, 783, 98 S. Ct. 1407, 1419 (1978)). Concluding that the Board of Education violated the students' First Amendment rights when it removed certain books from the school library because of their content, the Court expressly held that "the Constitution protects the right to receive information and ideas." Pico, 457 U.S. at 867, 102 S. Ct. at 2808 (quoting Stanley v. Georgia, 394 U.S. 557, 564, 89 S. Ct. 1243, 1247 (1969)).

Beyond this misinterpretation, the Government has also overlooked those decisions in which the courts have examined the public's right to receive information independent of the status of the speaker who communicated the information. For example, in Lamont v. Postmaster General, 381 U.S. 301, 85 S. Ct. 1493 (1965), the Supreme Court held that a statute permitting the Government to hold "communist political propaganda" arriving in the mails from overseas unless the addressee affirmatively requested in writing that it be delivered placed an unjustifiable burden on the addressee's First Amendment rights. Similarly, in Kleindienst v. Mandel, the Supreme Court held that the plaintiff professors had a First Amendment right to hear the views of Ernest Mandel, a Marxist journalist who was denied a visa to enter the United States. 408 U.S. at 761, 92 S. Ct. at 2582. Indeed, in upholding the visa denial, the Supreme Court noted the difficulty in weighing the professors' First Amendment rights against the Executive branch's power to exclude aliens in the name of national security. Id., 92 S. Ct. at 2582.

II. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

A. Plaintiffs Are Likely to Succeed on Their Challenges to the Licensing Scheme Based on the Public Forum Doctrine.

1. Public forum analysis is applicable here.

Relying once again on the Supreme Court's statement that there is no First Amendment right to broadcast "without a license," NBC v. United States, 319 U.S. at 227, 63 S. Ct. at 1014, the Government argues that public forum analysis is inapplicable in this case because "plaintiffs do not seek to use the radio spectrum for protected speech." Gov. Mem. at 7. As shown above, however, the Court's statement in NBC was mere dictum which is not controlling here and does not prevent plaintiffs from asserting that their First Amendment rights are being abridged by the present broadcast licensing scheme, including the broadcast license requirement itself. See I.A, supra.

Contrary to the Government's assertion, plaintiffs do not claim that the "entire radio spectrum" can be characterized as a public forum. Gov. Mem. at 7. As the pleadings make unmistakably clear, plaintiffs contend only that the spectrum to which they seek access--that dedicated to radio broadcasting--is a public forum. See, e.g., Pl. Mem. at 1 ("spectrum dedicated to radio broadcasting"); id. at 2 (same); id. at 28 (same); id. at 34 (same); id. at 41; First Am. Compl. at p. 2. Indeed, that is precisely how plaintiffs couch their position on the very page of plaintiffs' initial memorandum of law cited by the Government in support of its 'straw man' argument. Compare Gov. Mem. at 7 ("Plaintiffs apparently believe that the entire radio spectrum can be characterized as a public forum," citing Pl. Mem. at 34) with Pl. Mem. at 34 ("The spectrum dedicated to radio broadcasting is a traditional and designated public forum of virtually unlimited character"). It is thus irrelevant that many portions of the spectrum are off-limits to the general public or have not yet been allocated (Gov. Mem. at 7-8), since plaintiffs do not seek access to such spectrum. Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 801, 105 S. Ct. 3439, 3448 (1985)("in defining the forum we have focused on the access sought by the speaker").

Nor is it relevant that the Supreme Court has generally declined to apply public forum analysis when deciding whether there exists a First Amendment right of access to airtime on particular broadcast stations, Gov. Mem. at 8, citing Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 105 (1973), 93 S. Ct. 2080, 2100 (1973) and Arkansas Educ. Television Comm'n v. Forbes, 118 S. Ct. 1633, 1640 (1998), since plaintiff do not seek access to airtime on any broadcast stations but rather to the spectrum dedicated to radio broadcasting. As even FCC Chairman William Kennard has recognized, the mere fact that broadcast stations may not qualify as public fora does not preclude broadcast spectrum from being classified as a public forum. W. Kennard & J. Nuechteriein, We Never Said Broadcast Station Is a Public Forum, Legal Times, Feb. 19, 1996 (First Am. Compl. Ex. A, p. 3).

2. The spectrum dedicated to radio broadcasting is a traditional and designated public forum.

The Government further argues that if public forum analysis is applicable here, the "radio spectrum" cannot be classified as a traditional or designated public forum. Gov. Mem. at 8-13. Even apart from its mischaracterization of the "radio spectrum" at issue here, the Government's arguments are unpersuasive.

To be sure, "the Supreme Court has rejected the view that traditional public forum status extends beyond its historical confines." Forbes, 118 S. Ct. at 1641, citing Internat'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 681, 112 S. Ct. 2701, 2706-07 (1992)("ISKCON"). Contrary to the Government's assertion (Gov. Mem. at 9-10), however, that does not preclude classification of the spectrum dedicated to radio broadcasting as a traditional public forum. As plaintiffs have already observed, the Court's expressed reluctance to extend traditional public forum status beyond its historical confines was mere dictum in both Forbes and ISKCON--dictum that may be rejected by the Court in subsequent cases as easily as it rejected ISKCON's dictum that public forum analysis is only relevant to public property. See Pl. Mem. at 39-40 & n.11. Even though the spectrum dedicated to radio broadcasting hardly qualifies as having "'immemorially . . . time out of mind' been held in the public trust and used for purposes of expressive activity," ISKCON, 505 U.S. at 680, 112 S. Ct. at 2706, that spectrum plainly has been held in public trust for expressive activity by "long tradition" and "government fiat." Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 45, 103 S. Ct. 948, 954 (1983). See Pl. Mem. at 42-45.

It may be that classifying broadcast TV stations as traditional public fora would be "incompatible with" the First Amendment protections afforded broadcasters' exercise of editorial discretion. Forbes, 118 S. Ct. at 1640-41. But classifying the spectrum dedicated to radio broadcasting as a traditional public forum would surely not be incompatible with such First Amendment protections, as the Government mistakenly argues (Gov. Mem. at 10), since that would merely recognize a First Amendment right of access to certain broadcast spectrum, not to airtime on particular broadcast stations. See Pl. Mem. at 37.

The Government is also wrong in arguing that the spectrum dedicated to radio broadcasting cannot be considered a designated public forum. Gov. Mem. at 10-12. To be sure, since 1927, first through the FRC and later through the FCC, the government has selectively granted access to that spectrum. As plaintiffs have previously noted (see Pl. Mem. at 42-43), however, the spectrum dedicated to radio broadcasting remains virtually open for public discourse

because broadcast radio stations, as the quid pro quo for being "given the privilege of using scarce radio frequencies, must serve as "proxies for the entire community," obligated to present representative views and voices which would otherwise, by necessity, be barred from the airwaves. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390, 89 S. Ct. 1794, 1807 (1969); accord FCC v. Allentown Broadcasting Co., 349 U.S. 358, 362, 75 S. Ct. 855, 858 ("community radio mouthpiece[s]"). In short, while there is "selective access" to the spectrum dedicated to radio broadcasting, there is also compelling "evidence of a purposeful designation for public use." Cornelius, 473 U.S. at 805, 105 S. Ct. at 3450; see also Fighting Finest, Inc. v. Bratton, 95 F.3d 224, 230 (2d Cir. 1996) ("arguable" that "public use" in Cornelius means that "channel of communication is open to the public at large--either for speaking or for listening--or open at least to a class of groups whose meetings or memberships are open to the public at large" (emphasis added)).

Moreover, as plaintiffs have also previously noted (see Pl. Mem. at 44-45), "the broadcasting field [remains, in theory,] open to anyone [who seeks a broadcast radio license], provided there be an available frequency over which he can broadcast without interference to others," so long as he meets the requisite technical and financial qualifications; and "the channels presently occupied remain free for a new assignment to another licensee in the interest of the listening public." FCC v. Sanders Bros., 309 U.S. 470, 475, 60 S. Ct. 693, 697 (1940). Eligibility for broad-cast radio licenses thus has never been "reserved" to a "particular class of speakers," to whom licenses are then selectively awarded. Forbes, 118 S. Ct. at 1643.

In addition, as plaintiffs have further previously observed (see Pl. Mem. at 42-43), Congress enacted the present selective licensing scheme in 1927 only because "the radio spectrum simply [was] not large enough to accommodate everybody." NBC v. United States, 319 U.S. at 213, 63 S. Ct. at 1008. Prior to that time, broadcast licenses were, in theory, available to anyone who applied. Id. at 212, 63 S. Ct. at 1007. The spectrum dedicated to radio broadcasting is thus wholly different from property that the Government might have kept closed altogether but chose instead to selectively open to some expressive activity. Under these unique circumstances, "the Cornelius distinction between general and selective access furthers [no] First Amendment interests," since it cannot be seriously argued that the Government needed to be encouraged to designate spectrum for radio broadcasting. Forbes, 118 S. Ct. at 1642.

3. The broadcast licensing scheme burdens substantially more speech than necessary.

Proceeding on the incorrect assumption that the spectrum dedicated to radio broadcasting is a nonpublic forum, the Government next argues that there is nothing unreasonable in applying the present broadcast licensing scheme to microradio stations. Gov. Mem. at 13-16. That is simply not so. While expressing concern that unlicensed microradio stations "can" interfere with other radio devices, other radio stations (on the same or adjacent channels), and aircraft operations (Gov. Mem. at 14-15), the Government conspicuously ignores the complete absence of any record of such interference caused by Steal This Radio in its almost three years of (nearly) continuous operation. That barren record, coupled with the leisurely pace at which the Government has moved to shut down Steal This Radio, convincingly shows that the present broadcast licensing scheme burdens substantially more speech than necessary to adequately serve the Government's interest in preventing signal interference and ensuring public safety.

Contrary to the Government's assertion (Gov. Mem. at 15), the existence of adequate, less restrictive alternatives to the present broadcast licensing scheme, such as the lottery or registration schemes sometimes used to allocate scarce public space among different speakers in traditional public fora, "is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable." City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417 n.13, 113 S. Ct. 1505, 1510 n.13 (1993). See Pl. Mem. at 51-52. The Government does not address any of the cases cited by plaintiffs, including Discovery Network, which establish the relevance of such less speech-restrictive alternatives to the First Amendment issues here.

To be sure, the Supreme Court expressed reluctance in League of Women Voters, decided nearly 15 years ago, "to reconsider our longstanding approach to evaluating [broadcast regulation] without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required." FCC v. League of Women Voters of Cal., 468 U.S. 364, 104 S. Ct. 3106, 3115-16 n.11 (1984) (quoted in Gov. Mem. at 15-16). The Court did, however, strike down, as violative of the First Amendment, the statutory ban on editorializing by public TV stations. Id. at 402, 104 S. Ct. at 3129. League of Women Voters thus stands for the proposition that, upon a proper showing of First Amendment violations, the Court will not hesitate, or await a signal from Congress or the FCC, to invalidate parts of the broadcast regulatory scheme.

Finally, even if the spectrum dedicated to radio broadcasting were a nonpublic forum, and it surely is not (see II.B, supra), the present broadcast licensing scheme would not be reasonable, because of the unbridled discretion exercised by the FCC, under the "public interest" standard, in awarding licenses to broadcast stations and setting the terms and conditions of their operations. Summum v. Callaghan, 130 F.3d 906, 919-20 (10th Cir. 1997) (even in nonpublic forum, government may not exercise unbridled discretion in allowing and prohibiting expressive activity in order to prevent viewpoint discrimination). See Pl. Mem. at 56-65; II.D, infra.

4. The "public interest" standard impermissibly confers unfettered discretion on the FCC.

Invoking NBC yet again, the Government argues that it forecloses plaintiffs' challenge to the "public interest"

standard, under which the FCC has awarded licenses to broadcast radio stations, and set terms and conditions on their operation, for nearly 65 years, 47 U.S.C. 307(a), 309(a). Gov. Mem. at 17-19. That is simply not so.

Contrary to the Government's assertion (Gov. Mem. at 17), plaintiffs have not ignored NBC. Indeed, we have repeatedly urged the Court to carefully read NBC, taking note that the Supreme Court was not presented with any First Amendment claims based upon the public forum doctrine, such as plaintiffs pose here, and did have before it the long record of viewpoint-based and capricious licensing decisions made by the FCC under its "public interest" standard which now exists. See Pl. Mem. at 64-65; I.A, supra.

The Government's further assertion that public forum analysis is irrelevant to plaintiff's challenge to the "public interest" standard (Gov. Mem. at 18) overlooks the well-settled and often-invoked rule in public forum (and other) cases "that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional." Shuttlesworth v. City of Birmingham, Ala., 394 U.S. 147, 150-51, 89 S. Ct. 935, 938 (1969). See Pl. Mem. at 56-57. As plaintif fs have previously observed (see Pl. Mem. at 57-58), the "public interest" standard plainly cannot survive scrutiny under the Supreme Court's public forum decisions. See, e.g., Shuttlesworth, 394 U.S. at 150-51, 89 S. Ct. at 938-39 (striking down ordinance allowing city commission to refuse parade, procession, or demonstration permit if deemed necessary to protect "the public welfare, peace, safety, health, decency, good order, morals or convenience"); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 554, 95 S. Ct. 1239, 1244 (1975) (implying that "best interest of the community" standard would not survive First Amendment scrutiny).

To be sure, in making licensing decisions under the "public interest" standard, the FCC must take into account "'the purpose of the Act, the requirements it proposes, and the context of the provision in question.'" NBC v. United States, 319 U.S. at 226, 63 S. Ct. at 1014, (quoting New York Central Securities Corp. v. United States, 287 U.S. 12, 24, 53 S. Ct. 45, 48 (1932)). Gov. Mem. At 17. As the Government acknowledges, however, the "public interest" standard remains "'a supple instrument for the exercise of discretion.'" Gov. Mem. at 17, (quoting FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 138, 60 S. Ct. 437, 439 (1940)). The mere fact that the Communications Act of 1934, 47 U.S.C. 151 et seq., expressly or implicitly identifies some (but not necessarily all) relevant "public interest" factors thus does not prevent the FCC from exercising impermissible unbridled discretion under the "public interest" standard. Cf. Million Youth March, Inc. v. Safir, 1998 U.S. Dist. LEXIS ___ at *__ (S.D.N.Y. decided Aug. 26, 1998) (declaring unconstitutional, based upon Shuttlesworth, Section 1-07(c)(4) of City of New York's Street Activity Rules, which provided for denial of street activity permit in the "best interest" of the community for listed or unlisted reasons), aff'd, 1998 U.S. App. LEXIS 21567 at *3 (2d Cir. decided Sept. 1, 1998).

Given the well-documented record of capricious and viewpoint-based broadcast licensing decisions made by the FCC over the past 65 years (see Pl. Mem. at 61-64), the Government cannot credibly argue that plaintiffs' claim is "unsupported" by evidence that the 'public interest" standard has allowed the FCC to act improperly in making such decisions. Gov. Mem. at 18. Nor are plaintiffs simply making "policy arguments" in bringing such evidence to the Court's attention, as the Government erroneously contends. Gov. Mem. at 18. In that regard, the Government completely ignores--and presumably hopes that this Court will too--Justice Frankfurter's observation in NBC that:

> Congress did not authorize the [FCC] to choose among applicants upon the basis of their political, economic or social views, or upon any other capricious basis. If it did, or if the [FCC] by these Regulations proposed a choice among applicants upon some such basis, the issue before us would be wholly different.

NBC v. United States, 319 U.S. at 226, 63 S. Ct. at 1014.

The Government further argues that the availability of judicial review of FCC licensing decisions in the D.C. Circuit, 47 U.S.C. 402(b)(1), demonstrates that the FCC does not exercise unfettered discretion in making broadcast licensing decisions, citing the Bechtel decisions as proof positive that the FCC's discretion is not unlimited. Gov. Mem. at 18, citing Bechtel v. FCC, 957 F.2d 857 (D.C. Cir. 1992) ("Bechtel I") and Bechtel v. FCC, 10 F.3d 875 (D.C. Cir. 1993) ("Bechtel II"). Here too, however, the Government has ignored a critical passage, in particular, the D.C. Circuit's observation in Bechtel II that: "Reading the record in this case, and in a range of other cases, we are bound to say that only the [FCC's] lamentations about undue subjectivity have the ring of truth." 10 F.3d at 886 (emphasis added); see also id. at 887 (noting the "rich opportunities for graft and corruption in a public agency doling out valuable resources [that] flow from the statutory scheme itself").

Moreover, as plaintiffs have previously observed (see Pl. Opp. Mem. at 20-21), the availability of judicial review in the D.C. Circuit hardly constrains the FCC's licensing discretion under the "public interest" standard, given the broad deference accorded the FCC's "public interest" judgments: The [FCC's] implementation of the public-interest standard, when based on a rational weighing of competing policies, is not to be set aside by the Court of Appeals, for 'the weighing of policies under the "public interest" standard is a task that Congress has delegated to the Commission in the first instance." FCC v. WNCN Listeners Guild, 450 U.S. 582, 596, 101 S. Ct. 1266, 1275 (1981), (quoting FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775, 810, 98 S. Ct. 2096, 2119 (1978)); accord WOKO, Inc. v. FCC, 329 U.S. 223, 229, 67 S. Ct. 213, 216 (1946) ("it is the [FCC], not the courts, which must be satisfied that the public interest will be served by renewing the license").

In sum, judicial review in the D.C. Circuit is merely an "'illusory'" constraint on the FCC's virtually unfettered licensing discretion under the "public interest" standard and no "substitute for concrete standards to guide the [FCC's] discretion. City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 769-70, 108 S. Ct. 2138, 2151 (1988), (quoting Shuttlesworth, 394 U.S. at 150, 89 S. Ct. at 938), and citing Saia v. New York, 334 U.S. 558, 560, 68 S. Ct. 1148, 1149 (1948).

B. Plaintiffs Will Prevail On Their Other First Amendment Challenges To The Licensing Scheme

1. The broadcast licensing scheme is overbroad.

The Government's sole challenge to plaintiffs' overbreadth claim is based on an extremely strained reading of the Supreme Court's decision in FCC v. League of Women Voters of California, 468 U.S. 364, 104 S. Ct. 3106 (1984), and yet another application of its conclusory, all-purpose argument that plaintiffs have "no First Amendment right to broadcast." Gov. Mem. at 19. Relying on this argument, the Government fails to address any of the other decisional or statutory authority cited by plaintiffs. More importantly, the Government also appears to have disregarded a fundamental aspect of the overbreadth doctrine: that it has long operated as an exception to the rule that individuals may not litigate the rights of third parties. See, e.g., Barrows v. Jackson, 346 U.S. 249, 255, 97 S. Ct. 1586, 1590 (1953); United States v. Raines, 362 U.S. 17, 21-22, 80 S.Ct. 519, 521(1960); Note, "Standing to Assert Constitutional Jus Tertii," 88 Harv. L. Rev. 423 (1974). As the Court reiterated more recently in Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 503, 105 S. Ct. 2794, 2799 (1985), this principle means that "an individual whose own speech or expressive conduct may validly be prohibited or sanctioned is permitted to challenge a statute on its face because it also threatens others not before the court." See also NAACP v. Button, 371 U.S. 415, 432-33, 83 S. Ct. 328, 337-38 (1963). More specifically, "[o]ne who might have had a license for the asking may therefor call into question the whole scheme of licensing when he is prosecuted for failure to procure it." Thornhill v. Alabama, 310 U.S. 88, 97-98, 60 S. Ct. 736, 742 (1940).

In League of Women Voters, the Supreme Court both reaffirmed the vigor of the overbreadth doctrine, and clarified the analysis to be used in evaluating laws that impinge on First Amendment rights asserted in the broadcast medium. The Court was confronted with a facial overbreadth challenge to Section 399 of the Public Broadcasting Act of 1967, which forbid noncommercial educational stations receiving grants from the Corporation for Public Broadcasting from "engaging in editorializing." Finding the statute unconstitutionally overbroad, the Court held that the proscription of the statute was "not sufficiently tailored to the harms it seeks to prevent to justify its substantial interference with broadcasters' speech." 468 U.S. at 392, 104 S. Ct. at 3124. According to the Court, among the law'sspecific shortcomings were: (i) the statute's requirement that enforcement authorities examine the content of the message conveyed to determine whether the views expressed concern "controversial issues of public importance," id. at 381, 104 S. Ct. at 3118; (ii) the speculativeness and insufficiency of the risks proffered by the government as the justification for the restriction, id. at 390, 104 S. Ct. at 3123; (iii) the existence of established regulatory structures to address the asserted governmental interests, id. at 387, 104 S. Ct. at 3121; and (iv) the inadequacy of the statutory restriction in advancing these interests. Id. at 390, 104 S. Ct. at 3123.

Section 301 of the Act, governing the issuance of broadcast licenses, suffers from all of these deficiencies. First, as in League of Women Voters, the licensing scheme covers the full range of speech that may be aired by radio stations broadcasting over the available spectrum, 468 U.S. at 393, 104 S. Ct. at 3124, and further, it is policed by means of the FCC's review of an applicant's speech (the program content scheduled to be broadcast) to ascertain whether the grant of a license to the particular broadcaster would serve "the public interest." 47 U.S.C. Section 307(a). This system undeniably permits the FCC to control the content of what is broadcast, and therefore clashes directly with "the First Amendment's hostility to content-based regulation." League of Women Voters, 468 U.S. at 382, 104 S. Ct. at 3118-19 (quoting Consolidated Edison Co. v. Public Service Commission of New York, 447 U.S. 530, 537, 100 S. Ct. 2326, 2333 (1980)).

Second, the governmental interests asserted as justification for this content-based restriction do not support the imposition of so broad an encroachment on protected First Amendment interests. Indeed, the Government has not rebutted plaintiffs' contention that it has abandoned the scarcity rationale, see Gov. Mem. at 19-20, nor does it attempt to dispute plaintiffs' contention that the problem of radio broadcast interference is already secured by a variety of other regulatory means that intrude far less drastically upon the First Amendment freedoms of broadcasters. See 47 C.F.R. 73.1 et seq. Moreover, the Government has made no showing, as it is required to do, as to the substantiality of its asserted interests. See, e.g., United States v. Grace, 461 U.S. 171, 177, 103 S. Ct. 1702, 1709 (1983); Perry, 460 U.S. at 45, 103 S. Ct. At 955; United States v. O'Brien, 391 U.S. 367, 377, 88 S. Ct. 1673, 1679 (1968).

An examination of the fit between the Government's stated objectives and the scope of the regulatory framework reveals that the statute is neither narrowly tailored nor sufficiently pressing--given extant regulations expressly crafted to address these problems--to warrant its' broad suppression of broadcasters' First Amendment rights. Where, as is the case here, the asserted legislative or administrative purpose is a legitimate, or even substantial, governmental interest, "that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." Shelton v. Tucker, 364 U.S. 479, 488, 81 S. Ct. 247, 252 (1960) (footnotes omitted); see also

Schneider v. State of New Jersey, 308 U.S. 147, 161, 165 (1939). As plaintiffs demonstrated in their opening brief in support of their request for an injunction, numerous less speech-intrusive alternatives could be employed to fulfill the FCC's stated objectives. Pl. Mem. at 82.

Section 301 plainly falls within the category of statutes which, in purporting to regulate the time, place, and manner of expressive conduct, reach far beyond constitutional parameters to deter protected expression. See Grayned v. City of Rockford, 408 U.S. 104, 114-21, 92 S. Ct. 2302-06 (1972); Cameron v. Johnson, 390 U.S. 611, 617-19, 88 S. Ct. 1335, 1338-41 (1968); Thornhill v. State of Alabama, 310 U.S. 88, 97, 60 S. Ct. 736, 741-42 (1940). The scope of this abridgement "must be viewed in the light of less drastic means forachieving the same basic purpose." Because the regulatory scheme does not appropriately balance the need for regulation of the broadcast spectrum with microbroadcasters' First Amendment rights, the restrictions are not narrowly tailored to address the government's interests. The scheme is overbroad and therefore constitutionally infirm. As the Court aptly noted in its discussion of the objectives served by the fairness doctrine in League of Women Voters, if the mechanisms selected to achieve the articulated objectives ultimately result in a contraction of the marketplace of ideas, the Court must revisit its' initial analysis: As we recognized in Red Lion, however, were it to be shown by the Commission that the fairness doctrine "[has] the net effect of reducing rather than enhancing" speech, we would then be forced to reconsider the constitutional basis of our decision in that case. League of Women Voters, 468 U.S. at 378 n.12 (citation omitted).

Given the inherent weaknesses of the Government's argument, its challenge to plaintiffs' overbreadth claim must be rejected.

2. The broadcast licensing scheme creates an overbroad delegation of regulatory power.

The Government dismisses plaintiffs' claim that the broadcast licensing scheme creates an overbroad delegation of regulatory power with a brief reference to its standard conclusory argument and the NBC decision rendered by the Court in 1943. In doing so, the Government ignores the substantial decisional authority rendered in the last 55 years holding that licensing schemes which regulate expressive activity may exceed constitutional limits by "place[ing] unbridled discretion in the hands of a government official," and imposing a prior restraint on speech. FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 110 S. Ct. 596 (1990)(adult entertainment business licensing scheme); see, e.g., Freedman v. Maryland, 380 U.S. 51, 85 S. Ct. 734 (1965) (film licensing scheme); Staub, 355 U.S. at 321-22, 78 S. Ct. at 281-82 (ordinance prohibiting anyone from soliciting organizational membership without license); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 72 S.Ct. 777 (1952) (film licensing scheme). It also blatantly disregards the obvious constitutional shortcomings of the broadcast licensing scheme which unequivocally manifests each of the problems long associated with unbridled licensing schemes: self-censorship; arbitrary and discriminatory enforcement; and insulation from judicial review. See, e.g., Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947, 964 n.12, 104 S. Ct. 2839, 2850-51 n.12 (1984); Freedman, 380 U.S. at 58, 85 S. Ct. at 739.

The rule is well-established that while legislatures "ordinarily may delegate power under broad standards ..., [the] area of permissible indefiniteness narrows ... when the regulation ... potentially affects fundamental rights," like those protected by the First Amendment. United States v. Robel, 389 U.S. 258, 274-75, 88 S. Ct. 419, 429 (1967)(Brennan, J., concurring). However, where a law authorizes a system of prior licensing, the Supreme Court has gone further and has consistently required the statutory delegation to provide "narrowly drawn, reasonable and definite standards for the [administering] officials to follow." Niemotko v. Maryland, 340 U.S. 268, 271, 71 S. Ct. 325, 326 (1951) (reversing a disorderly conduct conviction for holding a meeting in a city park without a permit, where permit administration had been based only on custom).

The broad discretion provided the FCC, and the potential for the suppression of expressive activity--is manifest in the "public interest" standard that is intended to guide agency decisionmaking with regard to both the issuance and renewal of radio broadcast licenses. 47 U.S.C. 307(a), 309(a). Sections 307(a)and 309(a), which set forth this standard, violate one of the most basic tenets of First Amendment jurisprudence: that government regulations affecting speech must be drawn with clarity to avoid creating a license to censor and a chilling effect on freedom of expression. See Burstyn v. Wilson, 343 U.S. at 504-05, 72 S. Ct. at 782. The statutory scheme suffers from both manifestations of this constitutional defect; it has both a censorial and an inhibitory effect on protected speech and expressive activities.

Statutes which open-endedly delegate to administering officials the power to decide how and when licenses are issued are overbroad because they grant such officials the power to discriminate--to achieve indirectly through selective enforcement a censorship of communicative content that is clearly unconstitutional when achieved directly. See, e.g., Munson, 467 U.S. at 964 n.12, 104 S. Ct. at 2850-51 n.12 (state official's discretion to waive a requirement that charities spend no more than 25% of their proceeds on administrative expenses does not save the statute from being overbroad because "a statute that requires ... a license for the dissemination of ideas is inherently suspect."; Cox v. Louisiana, 379 U.S. 536, 557-58, 85 S. Ct. 453, 465-66 (1965) (where Louisiana statute prohibited all obstructions of "public passages," discretionary enforcement to permit certain parades and street meetings but to disallow others held invalid). The flexibility of the "public interest" standard not only invests FCC officials with unbridled discretion in the exercise of their regulatory power, it also concomitantly invites a particularly insidious type of self-censorship on the part of license applicants. By permitting FCC decisionmakers to view the content of the speech to be licensed, the statute creates the

most direct threat to speech, see Freedman, 380 U.S. at 58, 85 S. Ct. at 738-39, and the most significant risk of self-censorship. See Illinois Citizens Committee for Broadcasting v. FCC, 515 F.2d 397, 407 (D.C. Cir. 1975) (noting that the "more pervasive threat" to the First Amendment freedoms of broadcasters arises as a consequence of indirect content regulations). In addition, the periodic renewal requirements of the statutory scheme reinvigorate this risk with each application for license renewal. See City of Lakewood, 486 U.S. at 760, 108 S. Ct. at 2145 ("a multiple or periodic licensing requirement is sufficiently threatening to invite judicial concern."). The scheme thus clearly compels applicants for a broadcast license to design and temper their format and programming to suit the decisions and demands of those administering the scheme, and creates an impermissible risk of suppression of the communication of ideas. See Members of the City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 787, 798 n.15, 104 S. Ct. 2118, 2125 n.15 (1984); Freedman, 380 U.S. at 56, 85 S. Ct. at 737.

Another cardinal problem with the broadcast licensing scheme is the absence of any express standards to check the licensing authority. The courts have repeatedly emphasized that the lack of narrow, objective, and definite standards to guide licensing decisions creates unacceptable risks of censorship and arbitrary and discriminatory enforcement. See FW/PBS, Inc., 493 U.S. at 227-28, 110 S. Ct. at 606. Such a risk is clearly manifest here. Section 301 of the Act vests the FCC with the authority to issue broadcast licenses to applicants who seek to broadcast protected First Amendment speech over the electromagnetic spectrum, but delimits no boundaries to confine the agency's discretion and delineates no guidelines for its exercise. See Gooding v. Wilson, 405 U.S. 525, 529, 92 S. Ct. 1103, 1109 (1972).

The "public interest" standard essentially permits the agency licensing official to create a new standard for each application. Id. The opportunity for abuse provided by such an open-ended standard is self-evident. As the Supreme Court pronounced more than thirty years ago, a resulting deterrent to protected speech is not effectively removed (and hence the constitutional infirmity is not cured) if "the contours of the regulation would have to be hammered out case-by-case and tested only by those hardy enough to risk criminal prosecution [or other sanctions] to determine the proper scope of the regulation." Dombrowski v. Pfister, 380 U.S. 479, 487, 85 S. Ct. 1116, 1121 (1965).

Finally, the Government has failed to address plaintiffs' claim that the administrative discretion is so broad in this licensing scheme that it fails to provide critical procedural safeguards against the suppression of First Amendment activities. The Supreme Court has specifically noted the need for such safeguards in the First Amendment area. See L. Tribe, American Constitutional Law, (2d ed. 1988) at 1059 & n.4.

The lack of objective standards in the licensing statute insulates the FCC from judicial review of its license determinations. See City of Lakewood, 486 U.S. at 759, 108 S. Ct. at 2145. Without such standards, the courts cannot determine in any particular case whether the agency is discriminating against disfavored speech. See, e.g., Munson, 467 U.S. at 964 n.12, 104 S. Ct. at 2850-51; Cox v. Louisiana, 379 U.S. at 557, 85 S. Ct. at 465-66. Because the broadcast licensing scheme operates as a prior restraint on protected speech, adequate judicial review of the FCC's licensing decisions is critical. See, e.g., Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 83 S. Ct. 631 (1963). The absence of this safeguard within the current scheme obviously aggravates the constitutional flaws already in place. See Chicago Teachers Union v. Hudson, 475 U.S. 292, 304 n.12, 106 S. Ct. 1066, 1074 n.12 (1986) (invalidating a union dues rebate scheme, in part because it failed to afford a reasonably prompt opportunity for dissenters to challenge the amount of the fee before an impartial arbiter); Freedman, 380 U.S. at 58, 85 S. Ct. at 734 (striking down, for lack of procedural safeguards, a motion picture censorship statute which required exhibitors to submit films to an administrative board prior to their showing).

C. Plaintiffs Have Standing To Assert Their Challenges To The FCC'S Enforcement Policies And Practices

In arguing that plaintiffs lack standing to challenge the FCC's enforcement policies and practices, the Government once again chooses to ignore plaintiffs' arguments rather than address them. Unfortunately, evasion does not suspend the effect of decisive decisional authority. The Government fails to respond to plaintiffs' citation to Babbitt v. United Farm Workers National Union, 442 U.S. 289, 298-99, 99 S. Ct. 2301, 2308-09 (1979), as support for the well-established principle that to establish standing, a plaintiff need only show "a realistic danger of sustaining direct injury as a result of the statute's operation or enforcement," by alleging that either (1) he was threatened with prosecution; (2) prosecution is likely; or (3) there is a credible threat of prosecution. See also Younger v. Harris, 401 U.S. 37, 42, 91 S. Ct. 746, 749 (1971). Thus, contrary to the Government's contention, plaintiffs need not subject themselves to enforcement to be able to challenge the statutes at issue. Babbitt, 442 U.S. at 298, 99 S. Ct. at 2308-09 (citations omitted). Plaintiffs' continuing broadcast activities, see Pl. Opp. Mem. at 23-24, coupled with the Government's substantiated threats of prosecution in this case, and its continuing prosecution of other microbroadcasters across the country, see Presser Aff. 4-18, fulfill the requirements for injury articulated in Babbitt. 442 U.S. at 298, 99 S. Ct. at 2309 (standing exists when "the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by [the] statute, and there exists a credible threat of prosecution."). The law is clear that plaintiffs' showing with regard to each of the tests delineated in Babbitt is sufficient for standing purposes.

The Government similarly fails to address plaintiffs' claim that they have suffered a wholly independent and sufficient injury to their First Amendment rights because of the statute's "chilling" effect on their conduct. See Pl. Opp. Mem. at 24-25. As plaintiffs noted in their opposition brief, such harm provides a basis for standing. See Navegar, Inc. v.

United States, 103 F.3d 994, 998-99 (D.C. Cir. 1997); New Hampshire Right To Life Political Action Committee, 99 F.3d at 13.

Even if these allegations were not each a sufficient showing on this motion to dismiss, the Government's argument that the FCC has not taken any "steps to issue a formal or informal cease and desist order," Gov. Mem. at 21, is, at best, premised on disputed facts, and, at worst, a semantical argument that has been disdained by the courts. See Lewis-Mota v. Secretary of Labor, 449 F.2d 478, 481-82 (2d Cir. 1972) ("[T]he label that the particular agency puts upon its given exercise of administrative power is not, for our purposes, conclusive; rather it is what the agency does in fact.").

The Government's argument that plaintiffs cannot demonstrate injury-in-fact because they "voluntarily" ceased broadcasting is ludicrous and without basis in fact. Moreover, because the government's standing argument arises on a motion to dismiss, plaintiffs are entitled to the interpretation of all inferences in their favor. The Court must "read[] the complaint generously, accepting the truth of, and drawing all reasonable inferences from, the well-pleaded factual allegations." Brass v. American Film Technologies, Inc., 987 F.2d 142, 150 (2d Cir. 1993), and must accept as true all material allegations of the complaint, and must construe the complaint in the light most favorable to the plaintiff. Warth v. Seldin, 422 U.S. 490, 95 S. Ct. 2197 (1975).

CONCLUSION

For the reasons set forth above and in plaintiffs' initial memorandum of law, plaintiffs' motion for a preliminary injunction should be granted.

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Respectfully submitted,

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